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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 920

CLIFFORD A. JONES, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

	Page
Citations to Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement of the Case	3
Reasons for Granting the Writ	10
I. The Court of Appeals in Rendering Its Opinion Has Without Precedent, Delimited the Protections of the Fourth Amendment	10
II. The Petition Raises for Consideration a More Crucial Question Than That Presented to This Court in *United States* v. *White*, 405 F. 2d 838 (7th Cir. 1969) *cert.* granted 394 U.S. 957, reargued October 20, 1970	16
III. The Court Must Define for the Courts Below the Permissible Legal Limits to Which the Prosecution May go in Gathering Evidence To Be Used Against a Suspect in a Criminal Case	19
Conclusion	25
Appendix A—Jones Opinion in the Court of Appeals	1a
Appendix B—Jones Opinion in the District Court	14a

TABLE OF AUTHORITIES

CASES:

Agnello v. United States, 269 U.S. 20 (1925)	18
Amos v. United States, 255 U.S. 313 (1921)	23
Brown v. United States, 245 F. 2d 549 (8th Cir. 1957)	21
Byars v. United States, 274 U.S. 28 (1927)	12, 13
Communist Party v. Subversive Activities Control Board, 351 U.S. 115 (1954)	24

Page

Desist v. United States, 394 U.S. 244 (1968) ..10, 11, 17, 20
Goodman v. United States, 285 F.Supp. 245 (D.C. C.D. Cal. 1968) 25
Gouled v. United States, 255 U.S. 298 (1921) 12, 23
Hoffa v. United States, 385 U.S. 293 (1966) 13, 14
Honig v. United States, 208 F.2d 916 (8th Cir. 1953) 18
Jackson v. United States, 353 F.2d 862 (D.C. Cir. 1965) 17
Johnson v. Zerbst, 304 U.S. 458 (1938) 18
Katz v. United States, 389 U.S. 347 (1967) 10, 11, 14, 16, 19, 20
Knoll Associates, Inc. v. F.T.C., 397 F.2d 530 (7th Cir. 1968) 25
Lewis v. United States, 385 U.S. 206 (1966) 10
Lopez v. United States, 373 U.S. 427 (1963) 13, 20
McDonald v. United States, 335 U.S. 451 (1948) .. 23
Mesarosh v. United States, 351 U.S. 1 (1954) 24
Osborn v. United States, 385 U.S. 323 (1966) 15, 19
Rathbun v. United States, 355 U.S. 107 (1957) 19
Schmerber v. United States, 384 U.S. 757 (1965) 21
Sherman v. United States, 356 U.S. 369 (1958) .. 22
Silverman v. United States, 365 U.S. 505 (1961) ..12, 23
Sorrells v. United States, 287 U.S. 435 (1932) 22
United States v. Cachoian, 364 F.2d 291 (2d Cir. 1965) 17
United States v. Jeffers, 342 U.S. 48 (1951) ..14, 19, 23
United States v. Laughlin, 223 F.Supp. 623 (D.D.C. 1963) 17
United States v. McGavie, 337 F.2d 317 (6th Cir. 1964) 11
United States v. Page, 302 F.2d 81 (4th Cir. 1962) (en banc) 17
United States v. Shotwell Mfg. Co., 355 U.S. 239 (1957) 24
United States v. Vickers, 387 F.2d 703 (4th Cir. 1967) 17
United States v. Vita, 294 F.2d 524 (2d Cir. 1961) .. 11
Warden v. Hayden, 387 U.S. 294 (1967) 21
Weiss v. United States, 308 U.S. 321 (1939) 17
White v. United States, 405 F.2d 838 (7th Cir. 1969) *cert. granted* 394 U.S. 957 16
Williamson v. United States, 311 F.2d 441 (5th Cir. 1962) *cert. den'd* 381 U.S. 950 22
Wong Sun v. United States, 371 U.S. 471 (1963) 18

Page

STATUTES:

18 U.S.C. § 1621 3
18 U.S.C. § 3731 3

CONSTITUTIONAL PROVISIONS:

United States Constitution

Amendment IV ..... *passim*
Amendment V 18, 21

MISCELLANEOUS:

Shirer, Rise Fall of the Third Reich 15

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No.

CLIFFORD A. JONES, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Clifford A. Jones, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-captioned case on September 30, 1970.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals, reversing the judgment of the lower court, and remanding for further proceedings consistent with it opinion, is unreported and is printed in Appendix A,* *infra,* page 12.

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* Throughout the Petitioner's Brief, references to the Court of Appeals decision is cited as App. A at —; references to the District Court's decision is cited at App. B at —.

The decision of the lower court is reported at 292 F. Supp. 1001. For convenience, this opinion is printed in Appendix B,* *infra,* page 14a.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on September 30, 1970. A copy of the decision and judgment is annexed hereto as App. A. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether transcripts of conversations between a suspect and an associate, himself a likely candidate for indictment, monitored by the Government without judicial authorization and without the consent or knowledge of the suspect, are constitutionally admissible evidence in a perjury trial in order to satisfy the "two-witness" rule, when the associate, acting as an agent of the Government, under the prosecution's direction and control, initiated the conversations in question and lied to the suspect concerning the true purposes of his conversations with the suspect?

2. Whether the Government in its search for corroborative evidence of assumed perjury may utilize its own agent, without judicial authorization, to enter a suspect's hotel room and transmit by means of an electronic device private conversations to other Government agents and utilize the results obtained as evidence at trial in a federal court?

3. Whether evidence manufactured by Government attorneys pursuant to conduct bordering on entrapment, as found by a District Court upon an evidentiary record, is inadmissible at trial in a federal court?

STATEMENT OF THE CASE

In January, 1966, a three-count indictment was returned in the United States District Court for the District of Columbia charging petitioner with violations of 18 U.S.C. § 1621, perjury before a grand jury. Petitioner filed a pretrial motion to suppress evidence of certain of his telephone and face-to-face conversations with Wayne Bromley who was utilized by Government attorneys to obtain evidence against the petitioner Jones. On August 5, 6, and 7, an evidentiary hearing was held on the motion to suppress.[1] Immediately following the evidentiary hearing, oral argument was heard on the motion. The District Court then ordered that simultaneously briefs and reply briefs be filed by the parties. On September 30, 1968, the District Court filed a memorandum opinion granting the petitioner's motion to suppress. On October 16, 1968, the District Court ordered the evidence in question suppressed. The Government filed notice of appeal on October 28, 1968, by virtue of 18 U.S.C. § 3731.

The findings of facts hereinafter set forth occasioned a holding by the District Court that the prosecuting officials of the Government set out to "manufacture evidence" against the petitioner and incriminate him by methods "bordering on entrapment." The controlling facts, as found by the District Court,[2] are not complex. Wayne Bromley, in his October, 1964, appearance before a District of Columbia grand jury, committed per-

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[1] The principal witnesses at this hearing were petitioner, Bromley, Moore (one of the Government prosecutors), and Sandground (Bromley's attorney). App. B at 15a.

[2] United States v. Jones, 292 F. Supp. 1001, 1002-1006 (D.D.C., 1968); App. B, 14a-23a. The Government did not challenge in any particular the court's recital of the facts. App. A at 3a, footnote 3.

jury. He was resubpoenaed to appear again in February, 1965. This ordered second appearance caused Bromley to retain an attorney, Mark Sandground, to advise him.

Sandground immediately met with counsel for the grand jury, William O. Bittman and Donald P. Moore, Justice Department attorneys, seeking to postpone Bromley's appearance so that he (Sandground) could familiarize himself with Bromley's difficulties in order to properly advise him. Postponement was granted. Thereafter, in a series of meetings with Sandground, Bittman and Moore made it clear that evidence in their possession indicated Bromley had violated the tax laws in relation to his 1963 return and the perjury laws in his October, 1964 grand jury appearance.

Bittman and Moore also told Sandground that they did not need Bromley's cooperation to make out a successful tax case against Bobby Baker but that they did need "help in other Baker matters." Sandground was told that Bromley's "cooperation" would be "appreciated." Sandground, seeing "impending disaster" for Bromley, told Bromley that he was a likely candidate for indictment and counseled full cooperation with the Government attorneys as Bromley's only salvation.

Thereafter, Bromley and Sandground conferred with Bittman and Moore six days a week, sometimes twice daily, at either Sandground's home, his office, or at the Department of Justice. No promise was ever made that if Bromley gave evidence against Baker he would not be prosecuted. As the District Court noted, it is a fact that Bromley did cooperate with Bittman and Moore and that he was never indicted.

Bromley, after numerous lengthy meetings with Bittman and Moore, testified before the grand jury on February 23, 1965. He repudiated his previous testimony. He also testified, among other things, that petitioner Jones (an acquaintance) *knew* that he (Bromley) received money from First Western Financial Corporation (of which Jones was an officer) merely as a conduit for Baker, that he kept none for himself. This testimony harmonized with the Government's version of the "truth". App. B at 16a. Bittman and Moore "believed Bromley absolutely," felt he "could be trusted" and "was on the level". App. B at 18a.

Jones appeared before the grand jury on March 17, 1965, in response to a subpoena. He was questioned on many matters, including his relationship with Bromley. Several questions were "clearly prearranged and geared to lay the basis for perjury if [he] contradicted Bromley". App. B at 29a

Jones, in response to the contrived questions, denied having caused the issuance of First Western checks to Bromley as a conduit to Baker. He stated he knew Bromley as a lawyer-lobbyist retained by First Western and understood money was to go to Bromley for lobbying fees and that part was intended for politicians who could be helpful. None of the money was to go to Baker insofar as Jones knew. These statements are the bases of the three-count indictment returned in January, 1966, charging Jones with perjury before a grand jury.

Immediately after his grand jury appearance, Jones related to one Dee Kaufman, a friend of Bromley, what had occurred before the grand jury and asked her to inform Bromley what he had said about Bromley before the grand jury. He though Bromley should

know that the grand jury was investigating transactions involving Bromley. Days later when Jones telephoned Dee Kaufman on another matter, she said that Bromley was hurt that Jones had not called him personally to discuss his (Jones') testimony. This prompted Jones, who lives in Las Vegas, to telephone Bromley on the evening of March 22.[3]

This call was not monitored by anyone. Bromley's recollection of this crucial conversation is vague. App. B at 17a, 31a. Jones testified that he related in detail to Bromley the questions and answers that came up during Jones' appearance before the grand jury. Jones did not know of Bromley's February 23rd grand jury appearance and Bromley did not tell him. Significantly, Bromley did not disagree with Jones' version of the First Western payments which Jones said he gave to the grand jury. App. B at 17a. The conversation ended with neither party expecting the other to call back.

Bromley manifestly recognized his precarious position. If the Government accepted petitioner's version of the payments made by First Western, Bromley would be subject to tax evasion charges as well as additional perjury charges. *It was essential therefore that he convince the Government that he (an admitted perjurer) was now telling the truth and that petitioner was lying.* App. B at 17a.

Bromley immediately informed Sandground of his conversation with Jones and Sandground in turn reported the incident to Bittman and Moore, who sug-

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[3] The appellate court's reference to March 12, 1965, as the date of this call (App. A at 4a) appears to be a typographical error. See App. B at 17a.

gested that Bromley make a return call to Jones which the Government would monitor.

At the hearing, the court repeatedly pressed for an explanation of the reason for the immediate reaction to Jones' call both by Bromley and the prosecutors. As the court states: "None was obtained". App. B at 18a. Contrary to the theory which Bittman and Moore, with the help of Bromley, talked themselves into believing and acting upon, i.e., that Jones was endeavoring to induce Bromley to testify falsely, the evidence established and the District Court found that Jones merely called Bromley and told him what his testimony had been. The obvious explanation for the prosecutors' reaction, as the District Court found, was to obtain corroboration of Jones' assumed perjury. App. B at 19a.

The "conditioned" Bromley responded to the Government's suggestion. He agreed to make a return call to Jones and agreed to Government monitoring of the call. Thereafter, the Government, operating behind the facade of its programmed emissary, Bromley (App. B at 19a), set in motion the bizzare series of events which give rise to this petition—a series of events carefully orchestrated by Bittman and Moore and induced by lies (App. B at 30a), abuse of trust (App. B at 30a), tricks (App. B at 30a) and deceitful conduct (App. B at 29a) solely for the purpose of manufacturing evidence to corroborate Jones' assumed perjury in the context of Bromley's version of the facts.

Shortly after midnight (the morning of March 23rd) Sandground, Moore, Bittman, and a court reporter drove out to Bromley's home in Maryland. After their arrival Bromley called Jones on the false pretext that

he had not been able to talk to him earlier because of guests. Unknown to Jones, the conversation was being monitored by the court reporter over an extension phone in Bromley's kitchen. The transcript of the call shows that Bromley lied in stating to Jones that he *had not* appeared before the grand jury, and he persisted in this lie as he repeatedly invited Jones to tell him what to say when he did appear. The evidence shows and the District Court found that Bromley lied *at the instruction* of Government counsel. App. B at 19a. The transcript of this conversation does not contain a shred of evidence of any crime at all on the part of Jones. App. B at 20a.

On the evening of the 23rd, Jones telephoned Bromley. This call was not monitored. Bromely reported his version of this conversation to Sandground who relayed it to the Government attorneys. Jones testified at the hearing upon the motion to suppress that the purpose of this call was to provide Bromley with certain income tax information requested by Bromley during the monitored midnight call. The evidence shows and the District Court found that Bromley did request certain tax information during his conversation. App. B at 20a. Bromley claimed that Jones also wanted Bromley to set up a meeting among Bromley, Baker and Jones to discuss Bromley's testimony. Jones denied this, saying the meeting was Bromley's idea. Not in dispute, however, is the fact that it was Bromley, not Jones, who, at the instruction of the Government attorneys and with their active encouragement, made seven phone calls over a period of two days to Baker and Jones concerning the proposed meeting to discuss Bromley's forthcoming (so Jones was led to believe) appearance before the grand jury. These

calls were made from Sandground's office in the presence of Sandground, Bittman and Moore. All calls were monitored by attaching to the outside of Sandground's telephone an induction coil which was connected to a tape recorder. Bromley gave written consent to the monitoring. As a result of these calls, a meeting of Bromley, Baker and Jones was arranged for Friday, March 26, in Los Angeles.

The Attorney General authorized and Bromley consented to an electronic surveillance of the proposed meeting. Bromley attended the meeting in Jones' hotel suite with a transmitter strapped to his belly. Earlier in the day Bromley was instructed in the use of the transmitter which could be turned on and off by him. The 10:00 p. m. meeting of Jones, Baker and Bromley took place in the bedroom of Jones' suite where the three had withdrawn in order to assure their privacy. The meeting was monitored by Government agents who had receivers in nearby hotel rooms attuned to the transmitter's signals. The transcripts of this conversation are incomplete and fragmented notes of what was heard at two or three different receivers, no one of which picked up the entire conversation (if indeed the entire conversation was ever transmitted) for, as the District Court points out, Bromley was able to and did turn the transmitter off and on and the equipment did not operate properly. App. B at 21a. The transcript of these monitored conversations are to be offered in evidence by the prosecution in support of the testimony of Bromley, a witness found by the District Court to be highly suspect. App. B at 31a.

Viewing realistically the totality of the circumstances in which Bromley had placed himself, the District

Court found that Bromley did not voluntarily consent to the monitorings of his conversations with Jones.

The District Court also found that the use of the monitored conversations, which it termed "manufactured evidence," induced by conduct bordering on "entrapment" would, in the particular circumstances of this case, demean the integrity of the fact-finding processes.

REASONS FOR GRANTING THE WRIT

I

The Court of Appeals in Rendering Its Opinion Has, Without Precedent, Delimited the Protection of the Fourth Amendment

The Court of Appeals in its decision notes that the District Court relied primarily on *Katz* v. *United States*, 389 U.S. 247 and states that "The supervening effect of *Desist*, therefore would necessarily appear to undermine the District Court's ruling to the extent that it rests upon *Katz*." App. A at 6a. The Court of Appeals therefore determined that the evidence of the monitored conversations between Bromley and the petitioner in 1965 could be admitted at trial.

Since there was apparently no *physical trespass* by the Government in obtaining this evidence, the Court of Appeals concluded that the non-retroactivity of *Katz* precluded any necessity to consider the facts and circumstances of the alleged violation of the petitioner's Fourth Amendment rights. This Court has stated on numerous occasions, however, that each case in which it is alleged that the matter seized was in violation of the Fourth Amendment must be judged on its own particular facts. *Lewis* v. *United States*, 285 U.S. 208.

In the context of the facts in this case, as found by the District Court after a full evidentiary hearing at which it had the opportunity to appraise all the witnesses,[4] the conduct of the Government in obtaining this evidence under the pre-*Katz* decisions violated the petitioner's Fourth Amendment rights and warranted suppression of the evidence obtained. Irrespective of the decisions in *Katz* and *Desist*, the conduct of the Government in this case was shockingly improper and cannot be cloaked with the mantel of propriety by the blind invocation of *Desist*[5] by the Court of Appeals.

This case discloses deliberate affirmative deceitful action by the Government in order to manufacture evidence which would be corroborative of an assumed perjury. This case presents a factual situation without parallel in previously decided cases. The Government prosecutors, Bittman and Moore, actively staged the entire sequence of events using Bromley as a pawn to do their bidding. Two distinct situations are created by the conduct of the Government; the first situation relates to monitored telephone conversations which took place in Washington, D. C.; and the second situation, to the monitoring of the conversations at the Beverly Wilshire Hotel in Los Angeles, California. The con-

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[4] The District Court found that Bittman and Moore had Bromley lie to the petitioner, had Bromley initiate telephone conversations to the petitioner, and had Bromley make arrangements for the meeting at which the challenged conversations were recorded. These facts are supported by substantial evidence and are not clearly erroneous and are therefore controlling. *United States* v. *Vita*, 294 F. 2d 524, 528 (2nd Cir. 1961); *United States* v. *McGavic*, 337 F. 2d 317, 319 (6th Cir. 1964) *cert. den'd.* 380 U.S. 933.

[5] *Desist* merely concluded that to the extent that *Katz, supra,* "departed from the previous holding of this Court, it should be given wholly prospective application." 394 U.S. at 246.

duct of the Government in each situation is without Fourth Amendment precedent.

In this case, Bittman and Moore had Bromley lie to the petitioner; they had Bromley call the petitioner and tell him that he had not appeared before the grand jury and wanted to know what to do in connection with his forthcoming appearance. This action was not Bromley's independent action; this was the Government's action. Further, Bittman and Moore encouraged Bromley to make arrangements for a private meeting to discuss the situation, so they could wire Bromley for sound and record the conversations.

The pre-*Katz* decisions in *Gouled* v. *United States,* 255 U.S. 298, *Silverman* v. *United States,* 365 U.S. 505, and *Byars* v. *United States,* 273 U.S. 28, would condemn the conduct of the Government as violative of the petitioner's Fourth Amendment rights and warrant suppression of the evidence. In *Gouled,* Cohen, a private in the army, attached to army intelligence, and a friend of the defendant, under *direction* of his superiors, called on the defendant, gained admission to his office and carried away several documents. This Court condemned as a violation of the Fourth Amendment the conduct of the Government in obtaining evidence by *stealth* and *guile.* In *Gouled,* documents were taken; in the instant case *words* were taken. Even before *Katz,* words were brought within the ambit of the Fourth Amendment protection. In *Silverman,* while there was in fact a trespass, this Court clearly noted that the protections of the Fourth Amendment are not limited to tangibles but extend to oral statements. *Gouled* and *Silverman* compel the conclusion that the Government cannot "seize" oral statements by stealth and by guile, by affirmative deceptive means.

As the Court noted some time ago in *Byars* v. *United States*, 273 U.S. 28, 33-34

> The Fourth Amendment was adopted in view of the long misuse of power in the matter of searches and seizures both in England and the Colonies; and the assurances against any revival of it, so carefully embodied in the fundamental law, is not to be impaired by *judicial sanction of equivocal methods,* which regarded superficially may seem to escape the challenge of illegality but which in reality strike at the substance of the constitutional right.

This Court in *Lopez* v. *United States,* 373 U.S. 427, split four-to-four as to the admissibility of the evidence developed through the use of a surreptitious electronic recording of an incriminatory conversation held in Lopez's private office. Yet the Court of Appeals in this case seems to have no difficulty in making such evidence admissible at trial in a factual situation far more extreme.[6]

The conduct of the Government in the instant case is far more reprehensible than in *Lopez,* when it is realized that Bromley, was *planted* by the Government

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[6] In *Lopez,* an identified IRS agent was on Mr. Lopez's premises in the regular course of his duties when he was offered a bribe. In his subsequent visits, which were wired for sound, the agent did not affirmatively act to elicit the information. Even in *Hoffa* v. *United States,* 385 U.S. 293, the recordings by the informer were not utilized and the Government, in utilizing the testimony of Partin, did not contrive and plan the circumstances of the conversations and did not take any affirmative deliberate deceitful actions. Partin, although an informer, acted independently of the Government. Here the Government was an active participant, aiding and abetting violations of petitioner's constitutional rights.

in the petitioner's hotel room for the purpose of getting him to talk, to make admissions in the privacy and security of his hotel room, so that these conversations could be overheard and recorded by other Government agents. If the Court of Appeals decision is affirmed, the Fourth Amendment will be emasculated.

The protections of the Fourth Amendment were intended to prohibit warrantless intrusions by the Government. This Court had prior to the *Katz* decision carved out protected areas. See, e.g., *United States* v. *Jeffers*, 342 U.S. 48. Yet by its decision here the Court of Appeals holds, that there is no place where a citizen can retire, secure from Government intrusion; the Government can use friends, wired for sound, as agents to penetrate that enclosure, just as it had previously used a "spike mike" to penetrate a wall. The signal error of the opinion lies in treating the *governmental intrusion*, interdicted by the Fourth Amendment, precisely is if the intrusion were that of an acquaintance having no governmental role from which there is no protection. Generally speaking, when a man speaks, he runs the risk that what he says may be overheard and repeated. However, when he is in his home (pertinently his hotel room), as the petitioner was, he is entitled to be free from *governmental* surveillance or eavesdropping within that place, absent an intervening judicial determination of probable cause, warranting invasion of his privacy.

Clearly the Court of Appeals decision carries to an impermissible and dangerous extreme the concept in *Hoffa, supra*, at 302, "that Partin was in the suite by invitation, and every conversation which he heard was either directed to him or knowingly carried on in his presence. The petitioner in a word was not relying on

the security of his hotel room; he was relying on his misplaced confidence that Partin would not reveal his wrong doing."

In the case here presented, *the petitioner did rely on the security of his hotel room;* he went so far as to close the bedroom door so as not to be overheard by a person in the living room. *Yet the Government intruded into this sanctary with its walking microphone, Bromley.* This opinion opens the door to the most vile and vicious techniques known to be used in police states in which the end justified the means.[7]

If Bittman and Moore had "probable cause" and were assured of the perjurious conduct of the petitioner, they could have followed lawful procedures and obtained impartial *judicial* scrutiny of the scheme. See *Osborn* v. *United States,* 385 U.S. 323. This they did not do.

The Court of Appeals decision must be reviewed by this Court and reversed. Otherwise, the Government can ignore the required judicial processes and indulge in do-it-yourself conduct which would destroy Fourth Amendment protections.

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[7] The Government practice here is no different from the use by the Nazis of children, relatives and friends to spy upon parents and others within their homes and to report the nature of everything transpiring therein. See Shirer, *Rise and Fall of the Third Reich.*

II

The Petition Raises for Consideration a More Crucial Question Than That Presented to This Court in United States v. White, 405 F. 2d (7th Cir. 1969) Cert. Granted, 394 U.S. 957, Re-argued October 20, 1970.

The Court granted *certiorari* in the *White* case essentially to dispose of two questions: (1) whether the trial court should have excluded testimony by federal agents as to conversations between the defendant and the informant that agents overheard by means of an electronic device carried by the informant with his consent, but without obtaining a warrant; and (2) the retroactive application of *Katz* v. *United States,* 389 U.S. 347.

In the instant case, the consent issue, previewed in *White,* is raised vividly in two aspects of this case: (1) whether, Bromley himself voluntarily consented to the monitoring; and (2) whether, in view of Bromley's "consent" to the recording and monitoring of conversations in which he participated, there was a violation of petitioner's Fourth Amendment right to be secure against unreasonable searches and seizures without judicial authorization.

The Government asserts in this case that the need for a judicial authorization under the Fourth Amendment is obviated when one of the parties consents to the recording and disclosure of oral statements. Under the Government's theory, the objecting party by merely participating in the conversation allegedly waives the security guaranteed him by the Fourth Amendment. This thesis embraces the preposterous concept, hereinafter discussed, that one man can waive the cherished constitutional rights of another.

Assuming, *arguendo,* that the Government's thesis has validity, the District Court, after hearing and

evaluating the testimony of all the witnesses, held that Bromley's "consent" must be wholly voluntary in fact and not merely acquiescence coerced by the constant presence of the Government representatives, coupled with such fearful consequences as Bromley "clearly envisaged if he did not go along—indictment, loss of his job and eventually foreclosure of the mortgage on his home." App. B at 26a. Bromley's consent, as found by the court, based on facts of record, was exacted only by reason of his real and well-founded fear of indictment and his hope that cooperation with the Government would avert an indictment or at least insure a lenient sentence if he was indicted and convicted. *Weiss* v. *United States,* 308 U.S. 321 (1939); *United States* v. *Laughlin,* 223 F. Supp. 623 (D. D.C. 1963). It is well settled that the question of voluntariness is a question of fact for the District Court to decide. *United States* v. *Vickers,* 387 F. 2d 703 (4th Cir. 1967); *United States* v. *Cachoian,* 364 F. 2d 291 (2d Cir. 1965). The finding was not clearly erroneous and was supported by substantial evidence. *Jackson* v. *United States,* 353 F. 2d 862 (D.C. Cir. 1965); *United States* v. *Page,* 302 F. 2d 81 (9th Cir. 1962) (en banc).

Nonetheless the Court of Appeals ignored the findings of the District Court. The Court of Appeals did not assert that the findings are clearly erroneous, rather it asserted that the lower court obtained its result by an expansive reading of *Katz.* The rationale of the Court of Appeals on this point is incredible. The lower court's reading of *Katz*[8] has no bearing on the factual

[8] The Court of Appeals on the issue of Bromley's consent again relies on *Desist* to chide the District Court in its reading of *Katz.* The question of consent, first raised by the Government in this case, was not present in *Katz* and to this extent *Desist* does not have any bearing on the question of consent and more specifically the voluntariness of the consent.

issue of voluntariness. Certainly the District Court in its fact-finding mission can look behind the formalisms of consent at the totality of the facts.

The Court of Appeals focused on the presence of the attorney to render the consent voluntary. This assertion belies the intrinsic character of the situation. The presence of the attorney did not insulate Bromley from "coercion" and fear. If anything, the attorney compounded the apprehension by emphasizing the peril of the situation if Bromley did not cooperate. Consent as a matter of law means something more than willingness to cooperate or a formal document expressing consent.

This raises the second aspect in the consideration of the consent issue in this case. As the District Court noted: "It is difficult to see how Bromley's conduct whatever it was in this regard constituted a waiver of the constitutional rights of Jones." App. B at 26a. Clearly, constitutional protections are personal to the individual and cannot be waived by someone else. *Johnson* v. *Zerbst,* 304 U.S. 458. Searches conducted without warrants have been held unlawful, notwithstanding facts showing probable cause. *Agnello* v. *United States,* 269 U.S. 20. Such searches can only be lawful and reasonable by adherence to judicial processes. *Wong Sun* v. *United States,* 371 U.S. 471; *United States* v. *Jeffers,* 342 U.S. 48. See also *Honig* v. *United States,* 208 F. 2d 916, 921 (8th Cir. 1952).

In this case, there is an added consideration in that the search was not for tangible evidence, but for "testimonial" and "communicative" evidence. Here the actions of the Government must also be viewed in the light of Fifth Amendment strictures.

This Court has not yet decided, in a Fourth Amendment context, whether the consent to the monitoring and recording by one of the parties to a private conversation eliminates the need for judicial authorization. Compare *Rathbun* v. *United States,* 355 U.S. 107, with *Katz, supra.*

Katz did not decide the propriety of "consensual" intrusions by the Government into protected areas. In *Osborn* v. *United States, supra,* where there was consent of one of the parties to the "private" conversations which were monitored, it was specifically noted by this Court that judicial authorization was first obtained. The Government in the instant case d liberately bypassed the requisite impartial judicial scrutiny.

This Court must accept review of this case in order to focus on the consent issues which are clearly delineated in a Fourth Amendment context.

III

The Court Must Define for the Courts Below the Permissible Legal Limits to Which the Prosecution May Go in Gathering Evidence To Be Used Against a Suspect in a Criminal Case.

As an additional basis for the suppression of the evidence obtained through the use of Bromley as a tool of the Government, the District Court, after a full evidentiary hearing, stated that it "must invoke its supervisory powers" . . . "to suppress this effort to import manufactured evidence into this case." App. B at 28a. The Court of Appeals in its opinion asserts that the invocation of the court's supervisory powers is

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[9] Petitioner uses the word "consensual" merely because the word has gained prominence in recent decisions. By dictionary definition, "consensual" means the consent of both parties, mutual consent.

"questionable in these *special* circumstances when its effect would be to circumvent the import of the decision of the Supreme Court in *Desist*, . . ." (Emphasis supplied.) App. A at 11a. The exercise of the District Court's supervisory power cannot be tied to *Desist* and thus vitiated. The basis for the suppression by the court in this case transcends *Katz* and *Desist*.

The Court of Appeals in its decision approves the conduct of the Government and the methods used by stating "that the prosecutors were dealing with suspects whose very sophistication created obstacles to the search for truth and the vindication of the public interest in law enforcement." App. A at 12a. The protection against "manufactured evidence" is not contingent upon the sophistication and learning of the suspect. The actions of the Government in lying and misrepresenting must not be condoned.

Granted, the supervisory power doctrine is an extraordinary one which should be sparingly exercised. *Lopez* v. *United States*, 373 U.S. at 440. It is doubtfull, however, that the Court will ever have presented to it a more aggravated situation where the responsible prosecuting officials of the Department of Justice actively participated in what, it is submitted, is a shocking performance fully warranting the District Court's condemnation of it. The District Court was fully justified in invoking a court's supervisory power. This Court should now clarify the permissible limits of prosecutorial investigations "legally tolerable at this stage of our civilization." App. A at 12a.

The Court of Appeals justification for the admissibility of the monitored conversations is premised upon the fact that Bromley was an informer and that "the use of an informer had long been, and still is, regarded

as an available weapon in the arsenal; and we cannot see that the facts of Bromley's *cooperation* in this case cast the Government in any peculiarly villainous role." [Emphasis supplied.] App. A at 12a. But, this is not involved here; it is a case of using Bromley as a tool in a deliberate and calculated design by Government attorneys' to manufacture evidence.

This rationalization by the Appeals Court ignores the actual conduct of the Government, as found by the District Court. App. B at 29a-30a. The Government in this case did not use an informer merely to hear or to see what was going on. The prosecutors, Bittman and Moore, staged and controlled the entire sequence of events, from the first telephone conversation at Bromley's home in Bethesda, Maryland, to the meeting in the petitioner's hotel room in Los Angeles, California. When the petitioner appeared before the grand jury on March 17, 1965, Bromley had already twice testified and had been working in cooperation with the prosecution for some time. Questions asked petitioner at the grand jury proceedings were targeted to establish a predicate for perjury, if petitioner's testimony differed from Bromley's. Cf. *Brown* v. *United States,* 245 F. 2d 549 (8th Cir. 1957). However, in order to prove the crime of perjury, the Government had to have two witnesses or, alternatively, corroboration of Bromley's version of the facts. The sole purpose of the Government was to manufacture corroborative evidence.[10] App. B at 30a.

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[10] It has been well established by this Court that searches solely for the purpose of obtaining testimonial or communicative evidentiary matters are to be condemned as violative of the Fifth Amendment protections. *Warden* v. *Hayden,* 387 U.S. 294, 302-303; *Schmerber* v. *United States,* 384 U.S. 757.

Bromley was not the conventional informer. He had a vital stake in the prosecution and to this extent was, in fact, a contingent informer who is paid conditioned on the *success* in "getting" the evidence. In *Williamson* v. *United States,* 311 F. 2d 441 (5th Cir. 1962) *cert. den'd.,* 381 U.S. 950, the appellate court held inadmissible as a matter of law evidence from an informer whose compensation was contingent upon his production of evidence sought by police authorities.

Moreover, Bromley's actions in this situation were not casual or independent actions, they were controlled by Bittman and Moore; they told Bromley to tell the petitioner that he had not testified before the grand jury; they told Bromley to telephone petitioner to further discuss petitioner's statements to the grand jury; they suggested and actively encouraged Bromley in the seven calls which led to the meeting held at the Beverly Wilshire Hotel; they made all the arrangements for the monitoring. The prosecutors presumed that because of the personal relationship between Bromley and the petitioner, because of the trust, Bromley could invade a private area where the petitioner would feel secure, and then with the aid of an electronic listening device, broadcast the petitioner's "private" statements. By lies and trickery, Bromley would get the petitioner to reveal to the Government's uninvited ear *evidence essential to the offense to be charged.* As the District Court clearly recognized, *"It borders on entrapment.* See *Sherman* v. *United States,* 356 U.S. 369, 78 S. Ct. 819, 2 L. Ed. 2d 848 (1958); *Sorrells* v. *United States,* 287 U.S. 435, 53 S. Ct. 210, 77 L. Ed. 413 (1932)." [Emphasis supplied.] App. B at 30a.

The entire project was planned and conceived by the prosecutors to obtain evidence. In any stage of civiliza-

tion, such conduct must be condemned. Clearly, the conduct violates the fundamental concepts embodied in the Fourth Amendment that a person is secure in his home.[11] There must be some sanctuary which cannot be invaded by the Government or its "Bromleys" without judicial authorization.

If the conduct of the Government prosecutors is approved in this case, the protections of the Fourth Amendment become vacuous and the constitutional right of privacy is sacrificed in the name of police tactics. Cf. *McDonald* v. *United States,* 355 U.S. 451. If the Court of Appeals decision is correct, the Government can at any time "coerce" a friend to become its tool, by playing on his own fear of prosecution, and have that friend spy and obtain evidence against the suspect in the hope that his "cooperation" will be rewarded. Even more reprehensible is Government's affirmative deliberate *participation* in the events. In this case the prosecutors Bittman and Moore were with

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[11] The concept of home means any protected area of privacy where the person has the reasonable expectation that he will not be overheard or intruded upon. See *United States* v. *Jeffers,* 342 U.S. 48; *Gouled* v. *United States,* 255 U.S. 298; *Amos* v. *United States,* 255 U.S. 313. As was said in *Silverman, supra:*

> A man still controls a small part of his environment; he con retreat thence from outsiders, secure in the knowledge that they cannot get at him without disobeying the Constitution. This is still a sizeable hunk of liberty—worth protecting from encroachment. A sane decent civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure.

In this case, the petitioner was in the bedroom of his hotel suite, he had closed the door to be alone with his friend Bromley. The Government cannot be permitted to enter into this sanctuary by using a friend who has gained the petitioner's confidence by Government prompted iles.

Bromley every step of the way; they were present in his home on the night of March 23rd when they had him call the petitioner and told him to lie. The prosecutors staged all the telephone conversations which were monitored in the hope that the petitioner, under Bromley's lies, would incriminate himself. When that avenue yielded nothing, the prosecutors moved their pawn to make arrangements for a "private meeting" at which Bromley's fabricated problems could be discussed. Bittman and Moore, without any judicial authorization, then wired their walking microphone for sound, schooled him and planted him in the petitioner's hotel room. In the privacy of the petitioner's own hotel room, behind closed doors, the Government's programmed agent, by guile, sought to incriminate the petitioner.

This type of conduct, which demonstrates the active participation of the Government and the total disregard of the rights of the individual, is revolting and must not be tolerated.

This Court has in the past unhesitatingly granted review and reverse cases under its supervisory powers because the character of the key Government witness was such as to render his testimony inherently or necessarily untrustworthy. *Communist Party* v. *Subversive Activities Control Board,* 351 U.S. 115; *Mesarosh* v. *United States,* 352 U.S. 1; *United States* v. *Shotwell Mfg. Co.,* 355 U.S. 239. Here the Court is asked to review not only the character of the witness as an arm of the Government but the circumstances in which the testimonial evidence was obtained by the prosecutors. This Court should not permit the prosecution to pollute the fact-finding process. This Court cannot

condone the affirmative deceitful conduct of the Government.[12] As the District Court stated.

> Federal Court will lose their independent integrity if they permit the truth-finding process to be undermined by practices such as these which are inherently offensive to the fair administration of justice. App. B at 31a.

CONCLUSION

For the reasons stated above Petitioner prays that this Petition for a Writ of Certiorari be granted.

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[12] In a Fourth Amendment context numerous cases have held that the Government may not utilize the fruits of someone else's misconduct. See, e. g., *Knoll Associates, Inc.* v. *FTC*, 397 F. 2d 530 (7th Cir. 1968), and may not use evidence obtained by its own fraud and deceit. See, e.g., *Goodman v. United States*, 285 F. Supp. 245 (D.C.C.D. Cal. 1968).

APPENDIX A

Opinion of the Court of Appeals

U. S. COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,529

UNITED STATES OF AMERICA, APPELLANT

v.

CLIFFORD A. JONES

Appeal from the United States District Court
for the District of Columbia

Decided September 30, 1970

Mr. William S. Lynch and *Mr. Gerald E. McDowell,* of the bar of the Supreme Court of Virginia, *pro hac vice,* by special leave of court, with whom *Mr. Fred M. Vinson, Jr.,* Assistant Attorney General at the time the brief was filed, and *Miss Beatrice Rosenberg,* Attorney, Department of Justice, were on the brief, for appellant.

Mr. Edward P. Morgan, with whom *Messrs. Gerald S. Rourke* and *Thomas M. P. Christensen* were on the brief, for appellee.

Before BAZELON, *Chief Judge,* WILBUR K. MILLER, *Senior Circuit Judge,* and MCGOWAN, *Circuit Judge.*

MCGOWAN, *Circuit Judge*: The United States takes this appeal (18 U.S.C. § 3731) from the District Court's grant, after an evidentiary hearing, of a pretrial motion to suppress evidence. As its opinion indicates, *United States* v. *Jones,* 292 F. Supp. 1001 (D.D.C. 1968), the District Court relied in the first instance upon its reading of *Katz* v.

United States, 389 U.S. 347 (1967), as invalidating under the Fourth Amendment all monitoring of conversations which has not been either expressly consented to by the objecting party or approved in advance by judicial authority. Secondarily, it was said that, even if *Katz* be held inapplicable where the witness-party to the conversation himself consents to the monitoring, the purported consent of such party in this case was involuntary. Alternatively, and over and above these constitutional considerations, the court invoked its supervisory powers to rebuke what it regarded as overreaching by the Government "to import manufactured evidence into this case." For the reasons set forth hereinafter, we reverse.[1]

I

The principals in this case came to the attention of the Government through their alleged involvement in what is commonly known as the "Bobby Baker Case."[2] Both appellee and Bromley, the prosecution witness central to the issues here involved, were known to have a long history of association with Baker. Consequently, both at various times were summoned to testify before a District of Columbia grand jury which was looking into the Baker matter. Bromley appeared twice, once in October, 1964, and sub-

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[1] Disposition of this case after submission was stayed pending the outcome of United States v. White, 405 F.2d 838 (7th Cir. 1969), *cert. granted*, 394 U.S. 957 (1969); No. 46, *argued* November 10, 1969, *restored to the calendar for reargument*, January 19, 1970 (38 U.S.L.W. 3267). Since it has now become clear that the issues raised by the *White* appeal will not be settled until well into the 1970 Term, we deem it proper, especially in light of the substantial delay which has already occurred, to vacate the stay and proceed with our judgment on the merits. Cf. Baker v. United States, Nos. 21,154 and 23,327, decided June 30, 1970.

[2] Baker himself was tried and convicted of various counts of income tax evasion and conspiracy. His convictions have recently been affirmed by a panel of this court. *See* Note 1, *supra*.

sequently on February 23, 1965. Bromley was subpoenaed for the second appearance because the Government was suspicious of the veracity of his original testimony. Bromley, an attorney himself, as are appellee and Baker, was apprehensive of the Government's renewed interest in him, and, in anticipation of his second grand jury appearance, retained an experienced criminal lawyer, Mark Sandground, to advise him.

Sandground immediately requested and received a postponement of Bromley's appearance, and met a number of times with Justice Department attorneys who were conducting the investigation—Messrs. Moore and Bittman—in an attempt to ascertain the nature of Bromley's difficulties.[3] This elicited a disturbing response to the effect that Bromley was in danger of being prosecuted on a number of possible charges; and Bromley, upon Sandground's advice and despite the refusal of the prosecutors to promise immunity or make similar bargains, determined to cooperate, as the District Court found, "in the hope of some leniency along the way."[4]

Appellee was similarly a subject of the Government's interest. His name appeared with frequency in Baker's af-

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[3] The facts as recited herein are drawn from the District Court's Memorandum Opinion where they are set more fully at pp. 1002-1006 of 292 F.Supp. They reflect the court's view of the evidence adduced at the pretrial hearing of the motion to suppress. The principal witnesses at that hearing were appellee, Bromley, Moore, and Sandground. The Government does not challenge in any particular the court's recital of the facts.

[4] The District Court, after referring to repeated meetings between Bromley, Sandground, Moore, and Bittman, concludes this phase of its finding as follows:

> "At these and subsequent meetings between the Government lawyers and Bromley, no promise was ever made that if Bromley gave evidence against Baker he would not be prosecuted. When immunity was requested for Bromley it was not granted. But it is a fact that Bromley cooperated and that he was never indicted."

fairs, and he, too, was scheduled to testify before the "Baker Grand Jury." Appellee's testimony, given on March 17, 1965, conflicted with Bromley's. The latter had testified on his second appearance to receiving certain moneys from appellee as merely a conduit for their transmission to Baker. Appellee, contrarily, testified that the payments to Bromley represented legal fees for services rendered, and were for Bromley's account alone.

It was essential to Bromley that he show his version of the payments to be true, or he would be subject to liability for tax evasion. It was essential for the Government to show that appellee was aware of the falsity of his own grand jury statements in order to make out its perjury case. Appellee, knowing Bromley was scheduled to testify but apparently thinking that he had not appeared before the grand jury as yet, sought to transmit the nature of his own testimony to Bromley through the secretary of Fred Black, another Baker associate. This set in train the events which give rise to this appeal.

Appellee called Bromley on the night of March 12, 1965, following Bromley's representation to Black's secretary that he was "hurt" that appellee did not communicate with him directly. This call was not monitored, and Bromley's recollection of exactly what was said was hazy, although it appears that appellee did describe in detail the testimony given by him to the grand jury. Bromley immediately reported the call to Sandground, who concluded from Bromley's report that Bromley believed appellee was trying to influence him to tell a false story to the grand jury. In any event, Sandground promptly reported the incident in these terms to Moore and Bittman who saw in it the possibility that appellee, in addition to committing perjury, might be endeavoring to obstruct justice.

They now decided to ask Bromley, whom they had come to feel could be trusted, to participate in monitored conversations with appellee. They suggested a return call by Bromley to appellee, and arrangements were made with

Bromley and Sandground to meet at Bromley's home later that night. Bromley, after consulting with Sandground, signed a written consent to the monitoring. Shortly after midnight, on the pretext of having been unable to talk freely earlier, Bromley called appellee, with a stenographer listening on an extension phone. During the course of this and later monitored conversations, Bromley actively encouraged, upon the prosecutor's instruction, appellee's mistaken impression that he (Bromley) had not yet testified before the grand jury, and invited guidance as to what his testimony should be. He did not challenge appellee's assertions as to the "right" representations to be made by Bromley to the grand jury.

In the following days further telephonic communications, relating chiefly to the arranging of a meeting in Los Angeles between appellee, Baker, and Bromley, were monitored with Bromley's written consent.[5] Bromley attended the Los Angeles meeting in a hotel suite with a Kel transmitter taped to his chest and with Government agents receiving and recording the transmission in neighboring hotel rooms. This was done with the express authorization of the Attorney General and Bromley's formal consent.[6]

For purposes of the motion to suppress, it was understood that Bromley would testify for the prosecution at trial. The transcripts of the monitored conversations would be offered in evidence to support his testimony.

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[5] An exception is the first call in this series. Appellee called Bromley one evening. There is some conflict in Bromley's and appellee's testimony as to what was said in this unmonitored conversation. Bromley said that appellee wanted him to set up a meeting between themselves and Baker to talk about what Bromley should say to the grand jury. Appellee says it was Bromley who proposed the meeting. Sandground informed the prosecutors of the conversation on Bromley's behalf.

[6] At the Government's request, Sanground accompanied Bromley to Los Angeles and was reimbursed by the Government for his travel and other expenses. Appellee paid Bromley's transportation expenses, as Bromley had asked him to do. Bromley's other expenses were reimbursed to him by the Government.

II

The opinion of the District Court, relying primarily on *Katz*, was issued prior to *Desist* v. *United States*, 394 U.S. 244 (1969), in which the Supreme Court held that its decision in *Katz* was to be given wholly prospective application, that is to say, it would not bar evidence derived from electronic eavesdropping not involving a physical trespass and occurring before December 18, 1967. The eavesdropping here involved took place in 1965, some two years before *Katz*. The supervening effect of *Desist*, therefore, would necessarily appear to undermine the District Court's ruling to the extent that it rests upon *Katz*.

In a supplemental memorandum filed by leave of this court after *Desist* came down, appellee argues that it does not foreclose affirmance on this issue. It is said that, even without *Katz*, precedents prior thereto justify a decision in his favor. This is a dubious proposition at best,[7] and one made only more so by the Supreme Court's recognition in *Desist* that *Katz* represented "a clean break with the past."[8] Bereft of *Katz*, we do not understand that the

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[7] Silverman v. United States, 365 U.S. 505 (1961), is asserted by appellee to be "ample authority" for this claim. But in *Silverman* the Court was dealing with the problem of physical trespass, and, as the Government points out, if *Silverman* has the force now attributed to it by appellee, it would have compelled a different result in *Desist*.

[8] This court has recently dealt with Baker's argument that Bromley's testimony as to the monitored Los Angeles meeting should have been excluded because it was tantamount to introducing the logs themselves into evidence. Baker v. United States, Note 1 *supra*. We there said:

> "Assuming that the logs were used in court, Baker cannot object. The Supreme Court has held that it is constitutionally permissible to use monitored transcripts to substantiate the testimony of consenting informers who were parties to the conversations in question. Lopez v. United States, 373 U.S. 427, 438-440 (1963) . . ."

The Supreme Court's disposition next term of *White* may, as we recognized in *Baker*, "shed further light on the continued

District Court either would or could adhere to its primary ground of decision, at least so long as *Desist* survives, *see* Note 1 *supra.*

Furthermore, to the extent the argument is that the holding of *Katz,* which involved a monitoring of a telephone conversation neither known nor consented to by either party to the conversation, now be enlarged and extended so as to make the consent of appellee, as well as that of Bromley, essential to the propriety of the monitoring, we point to the approach adopted by the Court in *DeBacker* v. *Brainard,* 396 U.S. 28 (1969). There, the Court, faced with a request to extend a newly developed doctrine earlier determined to be non-retroactive, declined the request because the facts in question occurred prior to the cut-off date of the original decision.

It may be, as the District Court concluded, that the Supreme Court will one day make clear that *Katz* was intended to outlaw all monitoring of conversations without prior judicial authorization where the objecting party did not consent. But that broader view of *Katz* must, a *fortiori,*

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validity" of *Lopez* in the light of *Katz,* although *White,* unlike *Lopez* and the case before us, involved testimony solely by the eavesdropping agents and not by the informer himself. That *Lopez-Katz* question has been the subject of some divergence among the circuits. The view we have expressed in *Baker* accords with that taken by the Second Circuit in United States v. Kaufer, 406 F. 2d 550 (January 14, 1969), which was summarily affirmed by the Supreme Court by reference to *Desist,* Kaufer v. United States, 394 U.S. 458 (1969), *rehearing denied,* 395 U.S. 917 (1969). The Fifth Circuit has taken a similar position, most recently in Koran v. United States, — F.2d — (January 27, 1969), *cert. pending,* 38 U.S.L.W. 3044. The Tenth Circuit has undergone some development of its views, the latest statement of which accepts the continuing force of *Lopez.* Holt v. United States, 404 F.2d 914 (1908), *cert. denied,* 393 U.S. 1086 (1969), *rehearing denied,* 394 U.S. 967 (1969).

For the admissibility of the logs of the telephone conversations, certainly absent *Katz, see Rathbun* v. *United States,* 355 U.S. 107 (1957), and, more significantly, the post-*Katz* decision of the Supreme Court in Lee v. Florida, 392 U.S. 378 (1968).

be included within the non-retroactivity directed for *Katz* by *Desist*. Until that barrier is removed, if at all, by the court of last resort which constructed it, we do not see how the Government may be denied the benefit of it in this case.[9]

The District Court did, however, purport to find a foundation for its constitutional ruling which did not derive from *Katz*. This was its statement to the effect that Bromley's consent to the monitoring was involuntary. If that were true, *Katz*, narrowly or expansively read, would not be essential to a Fourth Amendment holding, although the District Court appeared to derive a new and higher standard for measuring consent from what it termed "the stringent, all-embracing constitutional prohibition of *Katz*."

We look only to what the concept of voluntariness has ordinarily been understood to involve in order to conclude that Bromley's repeated manifestations of consent were not nugatory in this instance. The District Court characterizes that consent as "coerced" by reason of the "constant presence of the Government representatives" and Bromley's fears of "indictment, loss of his job, and the eventual foreclosure of the mortgage on his home." This, so it is said, rendered the "wise, experienced advice of his attorney" merely a counsel "of necessity" which left Bromley "between Scylla and Charybdis, with no choice." Faced with these dismal prospects Bromley could not, says

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[9] In its post-*Desist* supplemental memorandum, appellee also argues that the District Court's decision may be sustained on the basis of Gouled v. United States, 255 U.S. 298 (1921). In *Gouled*, however, a warrantless search unknown to the defendant was carrier out in his absence, and he became aware of the fact for the first time when he was confronted with the seized papers at trial. The conversations involved in this case by contrast, were knowlingly and directly carried on with Bromley. What appellee did not know was that Bromley was cooperating with the Government. We think Hoffa v. United States, 385 U.S. 293 (1966), and Lewis v. United States, 385 U.S. 206 (1966), stand in the way of appellee's contention derived from *Gouled*.

the court, "give that kind and degree of consent which might otherwise be taken by some to justify an exception to be carved out of *Katz.*"

Apart from this fashioning of a new test of consent by reference to a wide-ranging reading of *Katz*—something which arguably has also been banned by *Desist*—we do not find in the record the coercion discerned by the District Court. Bromley was not an illiterate or unworldly person. He had been moving in very sophisticated circles indeed and, as is not infrequently the case, this had gotten him into trouble. An attorney himself, he wisely put himself in the hands of a lawyer versed in that kind of trouble, and followed his advice. In any event, this advice appears to have saved Bromley from the very consequences characterized by the District Court as coercive. It is certainly true that people who testify falsely before grand juries do not find themselves in the happiest of conditions, and are under the necessity of taking thought for the future. But that hardly means that a decision to tell the truth and to cooperate with the authorities is thereby coerced or involuntary in any meaningful sense.

The same claim of Bromley's consensual involuntariness now made by appellee has also been made by Baker, the other participant in some of the monitored conversations. Baker's contention in this regard was rejected by the District Court in the first instance, and by this court on appeal. *Baker* v. *United States,* Note 1 *supra.* Our comment on the point was as follows:

> "First, we do not agree with appellant's contention that Bromley was coerced into allowing the Government to monitor his conversations. Bromley's attorney was a former Government prosecutor, and had advised his client to take the course of action which the attorney felt was least likely to result in a criminal prosecution of Bromley. The mere fact that Bromley allowed the monitoring in the hope that doing so would preclude a criminal prosecution does not of itself vitiate Bromley's consent to the monitoring."

III

The District Court also purported to rely, in suppressing the transcripts in question, on the supervisory powers of the federal courts. Insofar as this approach is advanced or shaped by the previous finding of unconstitutional conduct, Part II of our opinion dissipates such support.[10] The court says, however, that it was not content to let matters rest on "constitutional principles," and we address ourselves to this aspect of its opinion as an independent ground of decision.

What we have said above with respect to the issue of the voluntariness of Bromley's consent is applicable here. In this part of its opinion the District Court reiterates its distaste for the actions of the prosecution in accepting and utilizing Bromley's offer of cooperation, and goes over much of the same ground as before in its strictures upon the monitoring operation. It characterizes the prosecution's effort as one to "import manufactured evidence" in order to satisfy the corroboration requirements in a perjury case. It is said that the Government's conduct "borders on entrapment," and that "the Government obviously overreaches" when it uses an informer "who stoops to such deceitful conduct" *vis-a-vis* an acquaintance in order to "reinforce his own efforts to escape indictment . . ." It is also seemingly critical of Bromley's lawyer for the role played by him in this incident, although elsewhere in its opinion the District Court referred to his "wise, experienced advice."

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[10] In a footnote to this part of its opinion, 292 F.Supp. 1010 n.8, the District Court undertakes to distinguish all the Supreme Court cases which might be thought to impose some restraint upon its exercise of supervisory power. It purports to do this in at least one important instance by referring to "the broad ruling in *Katz*." The later advent of *Desist* would appear to nullify the invocation of this kind of help.

Although the court concedes that informers and their use are not illegal *per se,* it concludes that the Government goes too far in employing them in such manner as to cause the suspect to make revelations "to the Government's uninvited ear." *Hoffa* and *Lewis,* Note 8 *supra,* are put to one side because they do not involve electronic or telephone interceptions, which suggests that the District Court's concern is not with deceit as such, since all informing is deceptive, but only with the deceit which uses electronic surveillance to assure that the informer's version of the conversation is truthful and accurate.

What emerges from all this is that the District Court would view the instrusion of that "ear" in virtually all circumstances with the greatest distaste. It is not alone in this respect, and, indeed, finds itself in very respectable company indeed.[11] The question before us, however, is not whether electronic surveillance and wiretapping in the abstract are good or bad things, but whether the Government overstepped the bounds of what was lawfully available to prosecutors at the time of the events in question.

The supervisory power doctrine is an extraordinary one which should be "sparingly exercised," *Lopez* v. *United States,* 373 U.S. at 440 (Harlan, J.). As a threshold matter, exercising this power is perhaps questionable in these special circumstances when its effect would be to circumvent the import of the decision of the Supreme Court in *Desist,* a purpose not to be attributed, of course, to the

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[11] *See* the separate dissenting opinions of Justice Holmes and Brandeis in Olmstead v. United States, 277 U.S. 438, 469- 485 (1927). More recently, and in the new scientific context, an influential minority of the President's Commission on Law Enforcement and Administration of Justice were not prepared, on the information then available, to support electronic surveillance even on prior judicial authorization. *See* the Commission's Report, The Challenge of Crime in a Free Society (1967) p. 203.

District Court since *Desist* had not come down when it acted.

Furthermore, application of the doctrine requires a finding that the Government's conduct is outrageous in light of the surrounding circumstances of an individual case. It is clear from the record that appellee was neither an unlearned, nor an uncounselled suspect.[12] Rather, the record is replete with indications that the prosecutors were dealing with suspects whose very sophistication created obstacles to the search for truth and the vindication of the public interest in law enforcement.

It may be that the dignity of our Government and its judicial system suffers when the United States employs an informer and uses what may be characterized as deceit in conducting a criminal investigation. It is also possible that the situation is exacerbated when the prosecution is for perjury, and the informer is a putative friend and co-conspirator,[13] although the utility of any informer depends upon the trust which the suspect reposes in him. The enforcement of the criminal law is not, however, a mere sporting game, and the hunters, as well as the hunted, have their problems. In the case of the former, the use of an informer has long been, and still is, regarded as an available weapon in the arsenal; and we cannot see that the facts of Bromley's cooperation in this case cast the Government in any peculiarly villainous role. When, as we have found here, the actions complained of are neither unconstitutional nor beyond the bounds of what has been thought legally tolerable at this stage of our civilization, we deem it unneces-

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[12] *Compare* McNabb v. United States, 318 U.S. 332 (1943), and Mallory v. United States, 354 U.S. 449 (1957).

[13] We note that the argument with respect to trickery and deceit advanced by defendant will be available at trial for the purpose of impeaching the credibility of the Government's witnesses.

sary to exercise the federal supervisory power to protect either the defendant or the processes of the trial court in the circumstances shown by this record.

The judgment appealed from is reversed, and the case is remanded for further proceedings consistent herewith.

It is so ordered.

BAZELON, *Chief Judge:* I feel that there are troubling ambiguities with respect to the impact of *Desist* v. *United States,* 394 U.S. 244 (1969), on the present case, but I am afraid that this court cannot resolve them until the Supreme Court has spoken to the issue again. I therefore concur in the result.

APPENDIX B

Opinion of the District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 40-66

UNITED STATES OF AMERICA

v.

CLIFFORD A. JONES

Memorandum Opinion

This is a perjury case based on allegedly false statements made before a grand jury in this jurisdiction. Defendant has moved to suppress evidence of certain of his telephone calls and other private conversations that were admittedly intercepted by the Government through various means and under circumstances later to be described. After a full evidentiary hearing on the motion, briefs were exchanged and the issues were argued to the Court. The Court has concluded that the motion to suppress must be granted. The factual background that follows is essential to a consideration of the applicable authorities.

I.

The facts in this case are not unduly complex. There were three persons whose conversations were monitored by the Government: defendant Jones, Wayne Bromley, and Robert G. Baker. All three were attorneys-at-law. The defendant lived in Las Vegas, Nevada, and the other two men lived in Washington, D. C. They were all well ac-

quainted with each other and had had some business dealings with each other.*

The course of events begins with Bromley's appearance before a District of Columbia grand jury investigating Baker in October of 1964. The Government considered his replies at that time concerning his relationship with Baker false and he was subpoenaed to appear again in February of 1965. Service of this new subpoena caused Bromley to retain an attorney, Mark Sandground, to advise him.

Sandground immediately met with Bittman and Moore, the Government attorneys, in order to postpone Bromley's appearance so that he would have time to determine the extent and nature of the difficulties his client faced and to decide what measures should be taken. The requested postponement was granted. Bittman and Moore, in a series of meetings with Sandground, thereafter discussed possible charges against Bromley. They made it clear that Bromley faced charges of income tax evasion and perjury before the grand jury as well as charges arising out of the whole "Bobby Baker matter." The Government attorneys emphasized the seriousness of these matters and revealed information to suggest the thoroughness of their investigation to date.

Moore and Bittman also told Sandground, who in turn told Bromley, that although they had sufficient evidence against Baker to indict him for tax evasion, they needed help in other Baker matters. It was indicated that Brom-

* The principal witnesses on this motion were Jones, Bromley, Moore (one of the Government prosecutors), and Sandground (Bromley's attorney). The first two mentioned were parties in interest. Moore was a careful witness and candid, although many facts in the area of his testimony were known by him only secondhand and his account was admittedly spotted with hearsay. Sandground testified after Bromley waived the attorney-client privilege and his testimony has generally been accepted where conflicts in testimony appear.

ley's "cooperation" would be "appreciated" by the Government. Sandground got the message. He considered Bromley a likely defendant and saw "impending disaster" for his client. Sandground advised Bromley that he was in extreme difficulty, that he was a likely candidate for indictment, and that the best course for him to follow was to cooperate fully with the Government attorneys in the hope of some leniency along the way. Bromley decided to do this and thereafter he and Sandground talked with the prosecution six days a week and often twice a day in different places. These meetings were at Sandground's home, at his office, and at the Department of Justice. At these and subsequent meetings between the Government lawyers and Bromley, no promise was ever made that if Bromley gave evidence against Baker he would not be prosecuted. When immunity was requested for Bromley it was not granted. But it is a fact that Bromley cooperated and that he was never indicted.

On February 23, after numerous meetings with the Government attorneys, Bromley appeared a second time before the grand jury, repudiated his previous testimony, and told what the Government now describes as the "truth." Part of Bromley's story was that Jones knew that Bromley received money from First Western Financial Corp., which he passed on to Baker, keeping none for himself, *i.e.*, he was a conduit for Baker. Later, on March 17, Jones appeared before the grand jury in response to a subpoena duces tecum. He was questioned on a wide variety of matters, including his relationship with Bromley and Baker. During this questioning Jones denied having caused the issuance of checks of First Western Financial Corp. to Bromley as a conduit to Baker. Jones, an officer of First Western, said he knew Bromley as a lobbyist retained by First Western and understood money was to go directly to Bromley for lobbying fees and that part was intended for politicians who could be helpful. None of the money was to go to Baker.

Acceptance of Bromley's contrary version of the conduit facts was very important to him. The payments to Bromley created income tax evasion problems for him unless he could show to the satisfaction of the Government that all the money was intended for someone else and just passed through him as a conduit. In short, to minimize the threat of possible indictment, he had to prove that he was now reliable and that Jones' version was false.

Immediately following his grand jury appearance, Jones returned to his friend Fred Black's office hotel suite at the Sheraton-Carlton, where he stayed regularly when in town. He recounted to Black's secretary Dee Kaufman, a friend of Bromley, what had occurred before the grand jury. Jones asked her to advise Bromley what he had said about Bromley during his testimony. Jones indicated he did this because he thought Bromley should know that the grand jury was investigating transactions in which Bromley was involved.* A few days later when Jones telephoned Dee Kaufman on another matter she said that Bromley was hurt that Jones had not called him personally to discuss his testimony. This prompted Jones, who lived in Las Vegas, to telephone Bromley in Washington on the evening of March 22.

This call was not monitored by anyone. Although Bromley's recollection is vague, it appears that Jones related to Bromley in more detail the questions and answers that came up before the grand jury. Jones did not know Bromley had been before the grand jury in February and Bromley did not tell him. Significantly, Bromley did not disagree with the version of the payments which Jones said he had given in his testimony before the grand jury. When their conversation ended, neither party apparently expected the other to call back.

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* The Federal Rules of Criminal Procedure do not prohibit or prevent a witness from disclosing the nature, content and extent of his testimony before a grand jury. *See* Rule 6.

Bromley immediately telephoned Sandground and told him that he had had a telephone call from Jones. Sandground apparently felt from information given him by Bromley that Bromley believed Jones was trying to influence Bromley to tell a false story. Indeed, Bromley may have so characterized the call. In any event, Sandground relayed this impression to the Government attorneys. None of the witnesses, other than Jones, could give a detailed account of this call and Jones' account does not support the impressions Sandground got from Bromley.

After Sandground reported the incident to Bittman and Moore, the latter checked with his immediate superior and then suggested Bromley make a return call to Jones which the Government would monitor. There had been prior conversations concerning monitoring between Sandground and the Government attorneys but this was the first time the Government attorneys decided to follow this dangerous course. The Government attorneys already "believed Bromley absolutely," felt he "could be trusted," and "was on the level"—they accordingly felt justified in using him in an attempt to incriminate Jones—as well as to discover if Jones was attempting to obstruct justice and to confirm Bromley's reliability as an informer.

The Court repeatedly pressed for an explanation of the reason for the immediate reaction to Jones' call both by Bromley and the prosecutors. None was obtained. Both Jones and Bromley had testified. Bromley must obviously have been prepared to stick by his version because he reported the call from Jones. He was not in physical danger. Jones had no leverage over him. Bromley cannot explain why he did not disagree with Jones when he heard Jones' version of the transactions. Jones was not a suspect in the Baker inquiry but he had been a perjury suspect in the eyes of the Government from the date of his testimony. Under all these circumstances it cannot be doubted that the Government's primary interest in conducting the sub-

sequent surveillance of conversations between Jones and Bromley was to obtain corroboration of perjury. Indeed, this is not seriously contested by the Government.

Sandground, Moore, Bittman and an employee of a court reporting firm went the same evening to Bromley's home in Maryland. At about midnight, Bromley telephoned Jones on the false pretext that he had not been able to talk earlier because he had had guests. Removal of the mouthpiece from the extension phone in the kitchen enabled the reporter listening in to take down the conversation between the two participants unbeknownst to Jones. Bromley had first signed a written consent to such monitoring after consulting with Sandground.

Before the conversation started, one of the Government attorneys told Bromley to say to Jones that he had not been before the grand jury. This was wholly false. Bromley did so and continually asked for Jones' guidance as to what he, Bromley, should tell the grand jury. Bromley was persistent in his lying attempts to make Jones incriminate himself, as the following excerpts from the transcript of the interception show:

> Mr. Bromley: I said you know—
> Mr. Jones: Yes.
> Mr. Bromley: —how it was supposed to have been handled, because—Look, as I told you earlier, I haven't actually been before the Grand Jury and I am wondering what I am going to say, if I am called.
> Mr. Jones: That is right.
> Mr. Bromley: I am getting right disturbed about it, because I haven't talked with—
> Mr. Jones: Mm-hm.
> Mr. Bromley: —our friend, and I just don't know how[,] you know[,] how this whole thing is going to be handled and it's really got me over a barrel.
> Mr. Jones: Well—
> Mr. Bromley: Plus the fact that I have to get my returns in less than a month, because last year, as I told you, I didn't get mine in until December 1st and they really haven't had time to check me out on it.

And I normally run into trouble and I want to know how to handle this one.

* * *

Mr. Bromley: No, I don't know. I have been under subpoena six weeks or more and I don't know why I haven't been called. . . . There is a bunch that haven't been called yet. I guess they are taking their time getting around to us.

* * *

Mr. Jones: What's that?

Mr. Bromley: I said I would like to bring Bobby with me so we could go over this thing.

* * *

Mr. Jones: There was nobody else present, but the two of us, was there, just the two of us?

Mr. Bromley: Cliff, are you asking me, or are you telling me?

Mr. Jones: I am telling you.

Mr. Bromley: O.K. All right.

Mr. Jones: That part of it—

Mr. Bromley: Yes. O.K.

On the evening of the 23rd, Jones again telephoned Bromley. Jones says he did this to provide Bromley with certain income tax information which had been requested by Bromley in the first intercepted call. This conversation was not monitored. Bromley claims Jones also wanted him to set up a meeting between Bromley, Baker and Jones to discuss Bromley's testimony. Jones denies this and says the idea of a meeting was entirely Bromley's. In any event, Bromley reported his version of this telephone call to the Government attorneys, again through Sandground.

It was decided that Bromley should telephone Jones and Baker and attempt to arrange such a meeting and that the Government should monitor the telephone calls. This was again at the Government's suggestion and with its active encouragement. There were no rules or regulations of the Justice Department covering a matter of this

kind. Moore and Bittman research some of the relevant legal authorities on electronic surveillance. It seemed safe to them to go ahead. Moore and Bittman asked for authority and their superiors authorized further interceptions of phone calls which Bromley was to make.

Bromley, Sandground, Moore and Bittman, along with an FBI agent, were at Sandground's office on March 24. Bromley again signed a written consent to the monitoring of phone calls from him to Baker and to Jones concerning the proposed meeting. The agent attached to the telephone an induction coil which was connected to a tape recorder in order to record the telephone calls. A series of calls were then monitored on the 24th and 25th, as a result of which a meeting between Bromley, Baker and Jones was arranged for Friday, March 26 in Los Angeles.

After obtaining the authorization of the Attorney General and the formal consent of Bromley for an electronic surveillance of the proposed meeting, further plans for monitoring were made. A transmitter was strapped to Bromley's belly by Government representatives in Sandground's office at Washington on the afternoon of the 26th. He was instructed as to its use. This device could be turned on and off by Bromley as he desired. The Government attorneys suggested that Bromley wear this concealed transmitter to Los Angeles so that he could broadcast the meeting to strategically placed receiving units the Government planned to set up there. The reason this was done in Washington was because Baker was expected to meet Bromley at the airport in Los Angeles.

Later that afternoon Bromley and Sandground flew to Los Angeles. Bromley's flight was paid for, as he had requested, by Jones. The Government paid his other expenses. The Government had asked Sandground to accompany Bromley and reimbursed him for his travel and out-of-pocket expenses. Moore took another flight to Los Angeles, rendezvoused with numerous Government attor-

neys and agents there, and made plans for monitoring the expected meeting between Bromley and Jones. Nine or ten people participated in the Los Angeles overhearing, including Assistant United States Attorneys and Narcotics Bureau agents. No representative of the FBI was involved.

Baker did not meet Bromley at the airport. The first transmission was a message from Bromley merely stating that he had had the transmitter off and would keep it off until the meeting began. Later that night at approximately 10:00 o'clock, transmission again began. A conversation between Jones, Bromley and Baker was broadcast from Jones' hotel suite. The three men had withdrawn into the bedroom of Jones' suite, leaving behind Baker's female companion in the living room in order to assure their privacy. The subsequent conversation was monitored by the Government agents who had receivers in nearby hotel rooms capable of picking up the signals from the transmitter taped to Bromley's stomach. Unlike the transcripts of the previous interceptions, the transcriptions of this surveillance are incomplete due partly to the faulty operation of the broadcasting system itself. Some conversations between Jones and Bromley which occurred after the meeting broke up were not overheard, possibly due to the fact that Bromley had again turned off his transmitter. Jones had no knowledge he was broadcasting through the device or that the Government was overhearing all or part of his conversation with Bromley.

The Government asserts that as far as this indictment is concerned, no significant leads were obtained from any of these monitorings. Nor were these transcripts brought to the attention of the grand jury. Their only use was as a basis for questions asked Bromley upon his subsequent appearance before the grand jury when the indictment of Jones for perjury was considered. The Government's purpose, however, is to offer the intercepted conversations in evidence at Jones' trial through the testimony of its representatives who overheard and transcribed both the

various telephone calls and the hotel meeting. The interceptions will be relied on as corroboration of the alleged perjury.

II.

Many different grounds have been urged in support of the motion to suppress. The central and decisive issue, however, is whether Jones' rights under the Fourth Amendment to the Constitution which protects persons against governmental intrusion by unreasonable searches and seizures were infringed because the Government intercepted certain of his conversations with Bromley. The constitutional requirements applicable to governmental covert interceptions of conversations were recently set forth in *Katz* v. *United States,* 389 U.S. 347 (1967), which reiterated that "the Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements, overheard without any 'technical trespass under . . . local property law.' *Silverman* v. *United States,* 365 U.S. 505, 511." 389 U.S. at 353.

Starting with this unambiguous premise, the holding in *Katz,* discussed in four different opinions on the majority side and one dissent, must be applied as against the facts in the instant matter. In *Katz* it appears that agents of the Federal Bureau of Investigation, having probable cause and acting in a circumspect manner but without prior judicial approval, placed an electronic listening device on the outside of a public telephone booth and intercepted telephone conversations which defendant made from the booth to others without the consent of the defendant or any of the other parties to the conversations. The Court rested its decision squarely on the lack of prior judicial control, no warrant having been obtained, and held that on the facts presented antecedent justification before a magistrate was central to a preservation of the Fourth Amendment guarantees. Accordingly, defendant's conviction based on the electronic surveillance was reversed.